

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOHN OLIVEIRA,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 02-383 ML
	:	
MARK SALES and Co Employee	:	
NANCY E. GIORGI, ¹	:	
Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is Defendants' Motion for Summary Judgment ("Motion for Summary Judgment") (Document #14). This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was conducted on April 28, 2003. After reviewing the memoranda and exhibits submitted and performing independent research, I recommend that the Motion for Summary Judgment be granted.

Overview

In April of 2002, Plaintiff was cited by the Town of Bristol, Rhode Island (the "Town"), for allegedly violating the Town's Zoning Code and the State's Building Code. Plaintiff contested the violations in the Town's Municipal Court, and they were ultimately dismissed. While the violations were still pending, Plaintiff filed the instant civil rights action in the State Superior Court against the

¹ In the Complaint, Plaintiff spells Defendant Giorgi's name as "Giogi." The court has corrected the spelling to "Giorgi."

Municipal Court Judge, Defendant Mark Sales ("Judge Sales"), and the Assistant Town Solicitor, Defendant Nancy E. Giorgi ("Solicitor Giorgi"), (collectively "Defendants") accusing them of violating his constitutional rights. Defendants removed the action to this court. Because Defendants are immune from suit by virtue of judicial and prosecutorial immunity, and the only claim arguably not barred by immunity otherwise fails, the Motion for Summary Judgment should be granted.

Facts

On April 10, 2002, Town officials² sent Plaintiff a letter which stated that he was in violation of the Town's zoning ordinance regulating open air storage and also of the State Building Code.³ See Defendants' Rule 12.1 Statement of Undisputed Facts in Support of Motion for Summary Judgment (Document #15) ("Defendants' SUF") ¶ 1; Defendants' Memorandum of Law in Support of Motion for Summary Judgment (Document #14) ("Defendants' Summary Judgment Mem."), Exhibit ("Ex.") A (Letter from Jack Evans and Gerhard Oswald to Plaintiff of 4/10/02). The zoning ordinance violation stemmed from the presence on Plaintiff's property of allegedly old tires, junk,

² The Town officials were Jack Evans, the Code Compliance Coordinator, and Gerhard Oswald, the Zoning Enforcement Officer. See Defendants' Memorandum of Law in Support of Motion for Summary Judgment (Document #14) ("Defendants' Summary Judgment Mem."), Exhibit ("Ex.") A (Letter from Jack Evans and Gerhard Oswald to Plaintiff of 4/10/02).

³ Plaintiff asserts that "[a]ll of the Defendants' facts are in dispute." Plaintiff John Oliveira's Objection to Defendant's [sic] Rule 12.1 Statement of Undisputed Facts Motion (Document #36) ("Plaintiff's Objection to SUF") at 4. However, it is clear that Plaintiff does not dispute that town officials sent him a letter stating that he was in violation of a Town Zoning Ordinance and the State Building Code.

used scrap lumber, and three large propane tanks. See id. The Building Code violations were based on the reportedly dilapidated condition of the front stairs and front porch of Plaintiff's house and peeling and falling paint from the house. See id. Plaintiff disputes that there were any violations. See Plaintiff John Oliveira's Objection to Defendant's [sic] Rule 12.1 Statement of Undisputed Facts (Document #36) ("Plaintiff's Objection to SUF") at 2-3. For purposes of the present Motion, the court assumes that there were no violations.

Plaintiff contested the alleged violations in the Town's Municipal Court. See Defendants' SUF (Document #15) ¶ 2; Plaintiff's Objection to SUF (Document #36) at 3.⁴ He alleges that he appeared for arraignment, but "refused to plead." Plaintiff's Objection to SUF (Document #36) at 3. A trial on the merits of the violations began on July 9, 2002, and continued to August 13, 2002. See Defendants' Summary Judgment Mem., Ex. B (Municipal Court Order reflecting dismissal and withdrawal of violations). After trial, the violations were dismissed either due to insufficient evidence or by motion of the Town. See id.

While the violations were still pending in the Municipal Court, Plaintiff, proceeding pro se, filed the instant action in the State Superior Court pursuant to 42 U.S.C. § 1983. See Complaint at 1. In the Complaint, Plaintiff alleges that Judge Sales and Solicitor Giorgi violated, among other rights, his constitutional rights to equal protection and due process

⁴ Again, although Plaintiff states he disputes all of Defendants' facts, see Plaintiff's Objection to SUF (Document #36) at 1-4, it is clear that he does not dispute that he contested the violations in the Municipal Court, see id. at 3.

of law. See id. at 2. He claims that Defendants conspired to use the Municipal Court "in an arbitrary capricious unrestrained manner." Id. ¶ 3. Plaintiff also claims that Judge Sales allowed Town officials to cite Plaintiff for violating sections of the State Building Code which were inapplicable and that Judge Sales arraigned Plaintiff without a signed complaint. See id. ¶¶ 1-2. Plaintiff asserts that Defendant Giorgi sent him notice of a hearing scheduled for May 28, 2002, but no hearing was held on that date and Plaintiff lost a day of work. See id. ¶ 4. Finally, Plaintiff appears to allege that Town officials committed fraud and perjury to Plaintiff's detriment and that these actions occurred with Judge Sales' knowledge. See id. at 2. For these alleged injuries, Plaintiff seeks "redress." Id.

Travel

The Complaint was filed on August 9, 2002, in the state Superior Court. Defendants removed the case to this court on August 30, 2002, citing 28 U.S.C. § 1331 which gives federal district courts original jurisdiction of all cases arising under the Constitution, laws, and treaties of the United States. See Petition for Removal (Document #1). Plaintiff filed an objection to the removal on September 9, 2002, see Objection (Document #5) and filed a motion to remand the case to the Superior Court on September 27, 2002, see Plaintiff's Motion to Remand to R.I. Superior Court by 1447(c) and (d) Errors by Defendants (Document #6) ("Motion to Remand"). Defendants objected to the Motion to Remand on October 4, 2002. See Defendants' Objection to Plaintiff's Motion to Remand (Document #7). On October 8, 2002, District Judge Mary

M. Lisi denied the Motion to Remand.⁵ See Order denying Motion to Remand (Document #8).

Plaintiff filed a motion for an enlargement of time to amend the Complaint on October 22, 2002. See Motion for Enlargement of Time to Amend Plaintiff's Complaint Time Requested 30 Days New Civil Rights Violation (Document #10) ("Motion for Enlargement"). The Motion for Enlargement was denied without prejudice by this Magistrate Judge in an order entered on November 14, 2002. See Order Denying Without Prejudice Motion for Enlargement of Time (Document #13).

Defendants filed the instant Motion for Summary Judgment on December 13, 2002. See Motion for Summary Judgment (Document #14). Plaintiff responded on December 19, 2002, by filing Plaintiff's Motion to Stay ("Motion to Stay"). See Motion to Stay (Documents #16, #17). Defendants filed a conditional objection to the Motion to Stay on December 30, 2002. See Defendants' Conditional Objection to Plaintiff's Motion for a Stay (Document #30). On December 31, 2002, Judge Lisi denied the Motion to Stay, but granted Plaintiff a thirty day extension to file his response to the Motion for Summary Judgment. See Order denying Motion to Stay (Document #20).

On January 7, 2003, Plaintiff filed a Motion for Decision in Writing Case No. 02-383ML (Document #21) ("Motion for Decision in Writing"). Although it is not entirely clear, apparently by the motion Plaintiff sought a written decision from Judge Lisi for her denial of his motion to remand the case to the Superior Court. Judge Lisi denied the Motion for

⁵ Judge Lisi denied the Motion to Remand by endorsing on the face of the motion: "Denied for the reasons set forth in Defendants' Memorandum in Opposition." Order denying Motion to Remand (Document #8).

Decision in Writing in an order entered on January 30, 2003. See Order denying Motion for Decision in Writing (Document #28).

In the meantime, Plaintiff noticed the depositions of Solicitor Giorgi and Judge Sales. See Plaintiff's Notice to Take Deposition (Document # 18). Defendants moved to quash the deposition notices on January 9, 2003. See Defendants' Motion to Quash Depositions Notice (Document #22) ("Motion to Quash"). Plaintiff objected to the Motion to Quash. See John Oliveira Plaintiff['s] Objection to Defendant[s'] Motion to Quash Depositions Notice (Document #23). A hearing on the Motion to Quash was held on January 13, 2003, and the court temporarily stayed the taking of Defendants' depositions, pending the issuance of a written decision. On January 21, 2003, this Magistrate Judge issued a Memorandum and Order Granting Defendants' Motion to Quash Depositions Notice (Document #26) ("Memorandum and Order dated 1/21/03"). The court found that the pending Motion for Summary Judgment involved a pure question of law, namely whether Defendants were immune from suit based upon judicial immunity and prosecutorial immunity, see Memorandum and Order dated 1/21/03 (Document #26) at 4, 7, and that Plaintiff had failed to show how the deposition of either Defendant could elicit any factual information which would be relevant to the determination of the legal question at issue, see id. at 7. However, in consideration of Plaintiff's pro se status and the fact that he had only a short period of time to respond to the Motion to Quash, the court granted the Motion to Quash without prejudice to the right of Plaintiff to present further argument in support of his contention that he should be allowed to depose Defendants. See id. at 7-8. By separate

order, Plaintiff was given until February 17, 2003, to submit additional argument why he should be allowed to depose Defendants and until March 3, 2003, to file his response to the Motion for Summary Judgment. See Order Clarifying and Further Extending Time for Plaintiff's Responses (Document #27) at 2.

On February 14, 2003, Plaintiff filed motions to depose Defendants and memoranda in support thereof. See Plaintiff John Oliveira['s] Motion to Take Deposition of Mark Sales in Case No. 02-383 M.L. and Memorandum of Law (Document #29) ("Motion to Take Sales Deposition"); Plaintiff John Oliveira['s] Motion to Take Deposition C.A. No. 02-383 M.L. of Nancy E. Giorgi (Document #30) ("Motion to Take Giorgi Deposition")(collectively the "Motions to Take Depositions"). Defendants objected to the Motions to Take Depositions on February 20, 2003. See Defendant's [sic] Objection to Plaintiff's Motion to Take Deposition of Judge Mark Sales (Document #31); Defendant's [sic] Objection to Plaintiff's Motion to Take Deposition of Nancy Giorgi (Document #32). Plaintiff responded by filing reply memoranda on February 27, 2003. See Plaintiff John Oliveira's Rebuttal to Defendant's [sic] Memorandum in Support of Objection to Plaintiff's Motion to Take Deposition of Mark Sales (Document #33); Plaintiff John Oliveira's Rebuttal to Defendant's [sic] Memorandum in Support of Objection to Plaintiff's Motion to Take Deposition of Nancy Giorgi (Document #33).⁶

The court treated the Motions to Take Depositions as further argument in support of Plaintiff's contention that he

⁶ Plaintiff's reply memoranda were docketed under a single document number (Document #33).

should be allowed to depose Defendants. In a Memorandum and Order issued on February 28, 2003, the court denied the Motions to Take Depositions. See Memorandum and Order Denying Plaintiff's Motions to Take Depositions (Document #34). The court found that the "allegations [in Plaintiff's Complaint] all involve the manner in which Defendant Sales performed his duties as a Municipal Court judge and, therefore, involve judicial acts for which he is absolutely immune." Id. at 4. Similarly, the court found that all of the claims against Solicitor Giorgi "are barred by the absolute immunity afforded to her in her role as assistant solicitor." Id. at 6.

On March 3, 2003, Plaintiff filed objections to the Motion for Summary Judgment and to Defendants' SUF. See Plaintiff John Oliveira's Objection to Defendant's [sic] Motion for Summary Judgment (Document #35) ("Plaintiff's Objection to Summary Judgment"); Plaintiff's Objection to SUF (Document #36). Plaintiff filed an amended objection to the Motion for Summary Judgment on April 23, 2003, as it pertains to Solicitor Giorgi. See Plaintiff John Oliveira's Amended Objection to Defendant Nancy E. Giorgi's Motion for Summary Judgment Claiming Immunity (Document #37) ("Plaintiff's Amended Objection to Summary Judgment"). The court conducted a hearing on the Motion for Summary Judgment on April 28, 2003, and thereafter took the matter under advisement.

Law

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law.”⁷ Fed. R. Civ. P. 56(c); Kearney v. Town of Wareham, 316 F.3d 18, 21 (1st Cir. 2002)(quoting Rule 56(c)). “A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law.” Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000). In ruling on a motion for summary judgment, the court must examine the record evidence “in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party.” Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000). However, the non-moving party may not rest merely on the allegations of the complaint, but must set forth specific facts as to each issue upon which he would bear the ultimate burden of proof. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d at 53. “[C]onclusory allegations, improbable inferences, and unsupported speculation,” Suarez v. Pueblo Int’l, Inc., 229 F.3d 49, 53 (1st Cir. 2000), are insufficient to avoid summary judgment, see id.

Discussion

I. Judge Sales

⁷ Plaintiff cites a 1933 New York state appellate court case, Brescia Construction Co. v. Walart Construction Co., 264 N.Y.S. 862 (N.Y. App. Div. 1933), for the proposition that a court should not make findings of fact and conclusions of law when granting a motion for summary judgment. See id. at 871. Summary judgment necessarily involves applying a legal standard to facts which must by definition be undisputed. See Amsden v. Moran, 904 F.2d 748, 752 (1st Cir. 1990). If by “conclusions of law” the Brescia court meant that a court should not apply a legal standard to undisputed facts, this court rejects Brescia as contrary to applicable federal case law.

At the hearing on April 28, 2003, Plaintiff conceded that Judge Sales is immune from suit. Plaintiff indicated that he was not pressing his objection to summary judgment as to this Defendant. The concession is fully warranted. It is well established that judges are absolutely immune from suit for their judicial acts unless they act in the clear absence of all jurisdiction. See Mireles v. Waco, 502 U.S. 9, 11-12, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991); Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978)("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction.")(internal quotation marks omitted); Pierson v. Ray, 386 U.S. 547, 553-54, 87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288 (1967)("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872)."); see also Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 435, 113 S.Ct. 2167, 2171, 124 L.Ed.2d 391 (1993)("The doctrine of judicial immunity is supported by a long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability."); Cleavinger v. Saxner, 474 U.S. 193, 200, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985)("judicial immunity firmly established").

Furthermore, there is also ample authority that judges are specifically immune to suits brought pursuant to 42 U.S.C.

§ 1983, the statute Plaintiff invokes in his Complaint.

See Dennis v. Sparks, 449 U.S. 24, 27, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980)("[T]his court has consistently adhered to the rule that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities.")(internal quotation marks omitted); Pushard v. Russell, 815 F.2d 1, 2 (1st Cir. 1987)("The law is well settled that the principle of judicial immunity survived the enactment of 42 U.S.C. § 1983."); Siano v. Justices of Mass., 698 F.2d 52, 55 n.4 (1st Cir. 1983)("[Plaintiff] correctly perceives that he is precluded from bringing a section 1983 damages action against the Justices by the doctrine of judicial immunity."). Accordingly, as to Judge Sales the Motion for Summary Judgment should be granted on grounds of judicial immunity, and I so recommend.

II. Solicitor Giorgi

A. Claims Barred by Prosecutorial Immunity

A prosecutor is absolutely immune from suit for actions taken in the course of performing her prosecutorial duties. See Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct. 984, 995-96, 47 L.Ed.2d 128 (1976)("[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."); Willhauck v. Halpin, 953 F.2d 689, 711 n.22 (1st Cir. 1991)("prosecutors enjoy absolute immunity against damages actions under § 1983 for activities in their quasi-judicial capacity")(citing Imbler); Celia v. O'Malley, 918 F.2d 1017, 1019 (1st Cir. 1990)("Absolute immunity is afforded to prosecutors in their quasi-judicial role in order to insure the independence and effectiveness of the criminal justice system."); Malachowski v. City of Keene, 787 F.2d 704, 711 (1st Cir. 1986)("In his

capacity as prosecutor ... he is absolutely immune from a suit for damages under § 1983."); see also Harrington v. Almy, 977 F.2d 37, 42 (1st Cir. 1993)(noting absolute immunity which prosecutors enjoy for their charging decisions).

The immunity afforded to a prosecutor remains even when she institutes a prosecution in bad faith for the purpose of retaliation. See Celia v. O'Malley, 918 F.2d at 1019 (citing Siano v. Justices of Mass., 698 F.2d 52, 58⁸ (1st Cir. 1983); Campbell v. Maine, 787 F.2d 776, 778⁹ (1st Cir. 1986)(refusing to recognize a bad faith exception to the scope of prosecutorial immunity as defined in Imbler)); cf. Reid v. New Hampshire, 56 F.3d 332, 337 (1st Cir. 1995)(holding that allegation that prosecutors repeatedly misled trial court in order to conceal their alleged misconduct does not defeat absolute immunity).

While a proper allegation of conspiracy could overcome Solicitor Giorgi's prosecutorial immunity, see Malachowski v. City of Keene, 787 F.2d 704, 711 (1st Cir. 1986)(citing San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246, 256 (2nd Cir. 1984)), Plaintiff's allegations here fall far short of what is required. Plaintiff alleges in his Complaint that Solicitor Giorgi conspired with Judge Sales to use the Municipal Court in an "arbitrary capricious unrestrained manner." Complaint ¶ 3. He fails to allege that the conspiracy is based on some racial or otherwise class-based, invidiously discriminatory animus, a necessary requirement to state a claim. See Burns v. State Police Ass'n of Mass., 230 F.3d 8, 12 (1st Cir. 2000)("To state a claim under [42 U.S.C.]

⁸ Pinpoint citation by this court.

⁹ See n.7.

§ 1985(3), a plaintiff must, among other requirements, allege the existence of a conspiracy intended to deprive an individual or class of persons of protected rights based on some racial, or perhaps otherwise class-based, invidiously discriminatory animus.")(internal quotation marks and citation omitted); Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 34 (1st Cir. 1996). Furthermore, his claim of a conspiracy is completely unsupported and, thus, need not be credited by the court. See Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999) ("[B]ald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited."); Rubinovitz v. Rogato, 60 F.3d 906, 909 (1st Cir. 1995)(noting that for purposes of summary judgment facts are considered in light most favorable to nonmoving party, but court "need not credit purely conclusory allegations").

The only additional allegation against Solicitor Giorgi in the Complaint is that she sent notice to Plaintiff of a scheduled court proceeding, but failed to enter the papers in the Municipal Court which resulted in the proceeding not occurring and Plaintiff losing a day of work. See Complaint ¶ 4. Such failure, even if deliberate, would not fall outside the protection afforded by prosecutorial immunity. See Buckley v. Fitzsimmons, 509 U.S. 259, 273, 113 S.Ct. 2606, 2615, 125 L.Ed.2d 209 (1993)("[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.") Thus, neither of the two claims alleged in the Complaint against Solicitor Giorgi are viable, and she is accordingly entitled to summary judgment.

Plaintiff makes additional allegations against Solicitor

Giorgi in other filings. He alleges that she: (1) allowed Town officials to file actions against him without a formal complaint, see Plaintiff's Amended Objection to Summary Judgment at 2; (2) conspired with Town officials to deny his request for all private complaints,¹⁰ see id.; and (3) threatened to prosecute him for exercising his constitutional rights to defend against frivolous charges and for refusing to sign a stipulated release, _in order to frighten Plaintiff and put him in danger of arrest, see Plaintiff's Objection to Summary Judgment at 3, 6, 7. As noted, these allegations were not pled in the Complaint, and the court may disregard claims which are not pled in the Complaint. See Bauchman v. West High Sch., 132 F.3d 542, 550 (10th Cir. 1997)(holding that plaintiff cannot avoid dismissal based on claims which are unpled). However, in the hope of putting this matter to rest, the court will address these additional matters.

Any cause of action based on the allegation that Solicitor Giorgi allowed town officials to file charges without a formal complaint is barred by prosecutorial immunity. See Buckley v. Fitzsimmons, 509 U.S. 259, 269, 113 S.Ct. 2606, 2614, 125 L.Ed.2d 209 (1993)("a state prosecutor ha[s] absolute immunity for the initiation and pursuit of a criminal prosecution"); Harrington v. Almy, 977 F.2d 37, 42 (1st Cir. 1993)(noting absolute immunity which prosecutors enjoy for their charging decisions). Plaintiff's claim that

¹⁰ During discovery proceedings in the Municipal Court, Plaintiff sought to obtain records from the Town's Building Department. He requested copies of all private complaints which had been received by the Town's Zoning Enforcement Officer. When the records were allegedly not produced, Plaintiff filed an action pursuant to 42 U.S.C. § 1983 in this court. See Report and Recommendation dated May 9, 2003, in Oliveira v. Evans, et al., C.A. 02-303T, at 1-3.

Solicitor Giorgi conspired with town officials to deny his request for "private complaints" lacks the necessary allegation of some racial, or otherwise class-based, invidiously discriminatory animus and fails for that reason, see Burns v. State Police Ass'n of Mass., 230 F.3d 8, 12 (1st Cir. 2000); Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 34 (1st Cir. 1996), as well as because the claim of a conspiracy is also totally unsupported, see Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999); Rubinovitz v. Rogato, 60 F.3d 906, 909 (1st Cir. 1995).

Plaintiff's claim that Solicitor Giorgi threatened to prosecute him for "refusing to sign a stipulated release," Plaintiff's Objection to Summary Judgment at 6; see also Plaintiff's Amended Objection to Summary Judgment at 3, does not fall outside the protection afforded by prosecutorial immunity. As a prosecutor for the Town, Solicitor Giorgi was free to prosecute or not to prosecute the violations. While it is unclear from Plaintiff's filings exactly what is meant by a "stipulated release," id., Solicitor Giorgi had the discretion to dismiss the violations in exchange for a signed release and also to tell Plaintiff that if he did not sign the release the prosecution would continue. Plaintiff also complains that Solicitor Giorgi warned him not to upset the judge. See Plaintiff's Objection to Summary Judgment at 6. Assuming that this statement was made, it clearly was made within Solicitor Giorgi's role as a prosecutor. Finally, the court rejects as improbable the inference, apparently drawn by Plaintiff from a statement allegedly made by Solicitor Giorgi that police officers were present, that refusing to sign the release would result in Plaintiff's immediate arrest. See Magarian v. Hawkins, 321 F.3d 235, 240 (1st Cir.

2003))(''[C]onclusory allegations, improbable inferences, and unsupported speculation' are insufficient to defeat summary judgment.")(quoting LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 842 (1st Cir. 1993)).

In short, Solicitor Giorgi enjoys absolute prosecutorial immunity for her actions in prosecuting Plaintiff for the alleged violations. All of Plaintiff's claims which are based on or arise from that prosecution are barred.

B. Tax Record Claim

Another claim, which is not pled in the Complaint but raised in other filings, is Plaintiff's contention that on April 15, 2002, Solicitor Giorgi instructed the Town's tax assessor not to give Plaintiff a record. See Plaintiff's Objection to SUF at 3; Plaintiff's Amended Objection to Summary Judgment at 3. Plaintiff alleges that this instruction was given to retaliate against him for filing notice of a \$100,000 lawsuit against the Town, arising out of the Town's alleged introduction of poison smoke into his home. See Plaintiff's Objection to SUF at 3. Arguably, this claim regarding an instruction to the tax assessor is unrelated to Solicitor Giorgi's performance of her duties as a prosecutor. As such it would be outside the scope of prosecutorial immunity. See Siano v. Justices of Mass., 698 F.2d 52, 58 (1st Cir. 1983)(noting that prosecutor's absolute immunity encompasses only those actions necessary "in initiating a prosecution and in presenting the State's case."). There is nothing in the statements provided by Plaintiff which would indicate that the instruction was made in the course of Solicitor Giorgi's prosecutorial duties. See Plaintiff's Objection to SUF at 3; Plaintiff's Amended Objection to Summary Judgment ¶ 3. The instruction was allegedly given

only five days after the notice of violations was sent to Plaintiff and well before his appearance in Municipal Court. These circumstances suggest that the instruction was unrelated to the prosecution of the violations.

For purposes of the present motion, the court will assume that the instruction to the tax assessor was not made by Solicitor Giorgi in her quasi-judicial role as a prosecutor and that, therefore, it falls outside the protection afforded by prosecutorial immunity. Nevertheless, summary judgment in favor of Solicitor Giorgi is still warranted. First, as previously noted, this claim is not pled in the Complaint and, therefore, it cannot be a basis for avoiding summary judgment. See Bauchman v. West High Sch., 132 F.3d 542, 550 (10th Cir. 1997). Second, Plaintiff alleges that the claim constitutes a violation of procedural due process, see Plaintiff's Amended Objection to Summary Judgment at 3, but, as explained below, this claim fails.

To establish a violation of procedural due process based on Solicitor's Giorgi's alleged direction to the tax assessor, Plaintiff must possess a recognizable constitutionally protected property interest in the tax records.¹¹ Assuming

¹¹ In order to establish a due process claim, Plaintiff must first establish a property interest. See Macone v. Town of Wakefield, 277 F.3d 1, 9 (1st Cir. 2002)(citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972)); see also Fireside Nissan, Inc. v. Fanning, 30 F.3d 206, 219 (1st Cir. 1994)("The protections of procedural due process are not triggered unless [Plaintiff] can show [he] has been deprived of a protectable liberty or property interest.")(citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985); Bd. of Regents of State Colls. v. Roth, 408 U.S. at 569, 92 S.Ct. at 2705). "Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" Fireside Nissan v. Fanning, 30 F.3d at 219 (quoting Cleveland

Plaintiff has a property interest in the tax record, his claim for deprivation of his procedural due process rights fails if he has an adequate state law remedy. See Zinermon v. Burch, 494 U.S. 113, 125-26, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990)(holding that a violation of procedural due process actionable under 42 U.S.C. § 1983 is not complete "unless and until the State fails to provide due process"); Reid v. New Hampshire, 56 F.3d 332, 336 n.8 (1st Cir. 1995)("Given an adequate state-law remedy for a procedural due process violation, no § 1983 claim lies."); Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 999 (1st Cir. 1992)(quoting Zinermon). Even intentional deprivations of property do not violate the Due Process Clause "provided ... that adequate state post-deprivation remedies are available." Hudson v. Palmer, 468 U.S. 517, 533, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393 (1984)(alteration in original).

The Rhode Island Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to 38-2-15 (1997 Reenactment)(2002 Supplement), specifically § 38-2-8, provides that a person who is denied the right to inspect a record of a public body by the custodian of the record may petition the chief administrative officer of that body for a review of the determinations made by his or her subordinate, see R.I. Gen. Laws § 38-2-8(a) (1997 Reenactment). The chief administrative officer is required to make a final determination whether or not to allow public inspection within ten business days after submission of the review petition. See id. If the chief administrative officer determines that the record is not subject to public

Bd. of Educ. v. Loudermill, 470 U.S. at 538, 105 S.Ct. at 1491 (quoting Roth, 408 U.S. at 577, 92 S.Ct. at 2709)).

inspection, the person may file a complaint with the state attorney general. See R.I. Gen. Laws § 38-2-8(b). The attorney general is then required to investigate the complaint, and, if the attorney general determines the allegations of the complaint are meritorious, he or she may institute proceedings for injunctive or declaratory relief in the superior court of the county where the record is maintained. See id. A failure to respond to a request to inspect or copy a public record within the ten business day period is deemed to be a denial. See R.I. Gen. Laws § 38-2-7(b).

"[T]he existence and adequacy of the remedies provided by state statutes is a question of law, not of fact." Gudema v. Nassau County, 163 F.3d 717, 724 (2nd Cir. 1998). This court finds as a matter of law that Rhode Island's Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to 38-2-15, provides an adequate state remedy where a tax assessor denies or fails to respond to requests for records. Consequently, because Plaintiff has an adequate state remedy, any claim for violation of his right to procedural due process based on Solicitor Giorgi's alleged instruction to the tax assessor not to release records to Plaintiff fails. See Zinermon v. Burch, 494 U.S. 113, 125-26, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).

Conclusion

For the reasons stated above, I recommend that the Motion for Summary Judgment be granted as Plaintiff's claims against Judge Sales are barred by judicial immunity and his claims against Solicitor Giorgi are barred by prosecutorial immunity or otherwise fail. Any objections to this Report and Recommendation must be specific and must be filed with the

Clerk of Court within ten (10) days of its receipt. See Fed R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
May 15, 2003